No. 96-110

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,
Attorney General of Washington,
Petitioners,

v.

HAROLD GLUCKSBERG, M.D., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF COUNCIL FOR SECULAR HUMANISM AND INTERNATIONAL ACADEMY OF HUMANISM IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state may compel a terminally ill, competent person to live in irremediably painful and degrading conditions by absolutely prohibiting her from receiving the assistance she requires to end her life.

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INTEREST OF THE AMICI CURIAE

The Council for Secular Humanism is a non-profit educational organization, headquartered in Buffalo, New York, dedicated to fostering the growth of the traditions of democracy, respect for human rights and the principles of free inquiry. The Council is responsible for publishing the quarterly, Free Inquiry. The Council has always had a keen interest in promoting and protecting individual autonomy and has published numerous articles and sponsored symposia discussing the morality and legality of assisted suicide and euthanasia. *E.g., The Case For*

Active Voluntary Euthanasia, 9 Free Inquiry 3-21 (Winter 1988).

The International Academy of Humanism is an affiliate of the Council established to draw on the resources of various distinguished writers, academics, politicians and scientists (including Nobel laureates) in disseminating humanistic ideals and beliefs. The Secretariat of the International Academy of Humanism consists of Vern Bullough, professor of history, California State University; Antony Flew, professor emeritus of philosophy, Reading University; Paul Kurtz, professor emeritus of philosophy, SUNY at Buffalo; Gerald Larue, professor emeritus of archaeology and biblical studies, University of Southern California at Los Angeles; and Jean-Claude Pecker, professor of astrophysics, Collège de France, Académie des Sciences. (A complete listing of the members of the Academy may be found at 16 Free Inquiry 66 (Fall 1996).) Although the members of the International Academy of Humanism have divergent views about the circumstances under which assisted dying is morally justifiable and should be legally permissible, they believe that an absolute ban on assisted suicide violates a liberty interest of the terminally ill.

Through their counsel, the parties have consented to the appearance of these *amici*.

SUMMARY OF ARGUMENT

"Our Constitution is designed to maximize individual freedom within a framework of ordered liberty." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Compelling a competent person to remain alive under conditions she finds irremediably painful and degrading is starkly inconsistent with the respect for personal autonomy that is an intrinsic part of our national heritage. In forcing someone to remain alive against her will, the State appropriates her life. The only conceivable comparison to the horror

of a compelled life would be compelling a person to marry, and spend all her waking hours with, someone she finds utterly loathsome.

An absolute ban on assisted suicide has the effect of compelling the terminally ill to remain alive. Unassisted suicide is an option only for the robust and healthy. The terminally ill are, in most cases, too debilitated, confined and dependent on others to have the ability to use, and obtain access to, violent means of causing death, and, of course, the State maintains control of the dispensation of lethal medications. As applied to the terminally ill, a blanket prohibition of assisted suicide is unduly burdensome as it deprives them of the freedom of abandoning an existence they find unbearable.

Contrary to the suggestion of petitioners and their *amici*, respondents are not asking this Court to authorize unbridled liberty. Conduct harmful to others is always subject to reasonable regulation. However, exercise of a fundamental liberty interest cannot be absolutely prohibited based on vague speculation about indirect harm to others. Instead, this Court's rulings require a showing of the gravest imminent danger to the public safety to justify a substantial deprivation of liberty. *Kent v. Dulles*, 357 U.S. 116, 128-29 (1958). The State's legitimate interest in preventing those who reject assisted suicide from being pressured or manipulated into requesting assistance in dying can be served by stringent regulation short of an absolute ban.

An instructive analogy can be made to the freedom to bear and beget children. There is incontrovertible evidence that child abuse, up to and including the murder of children, is linked to a family's income. A licensing scheme that would prohibit persons from having children until they reached and maintained a certain income level would save thousands of children annually. However, no one seriously entertains such a proposition; we place too

high a value on choices central to personal dignity and autonomy.

If this Court is to be faithful to our constitutional heritage, it must find that the State cannot compel a terminally ill person to live when respect for her autonomy presents no imminent danger of harm to others.

ARGUMENT

I. A STATE'S ABSOLUTE BAN ON ASSISTED SUICIDE VIOLATES THE FUNDAMENTAL LIBERTY INTEREST IN NOT BEING COMPELLED TO LIVE IN IRREMEDIABLY PAINFUL AND DEGRADING CONDITIONS

The issue before the Court is whether an individual competent to make decisions on fundamental matters that give shape, direction and personal significance to her life may be compelled to remain alive under conditions she finds irremediably painful and degrading.[1] Consistent with this Court's recognition that the Due Process Clause of the Fourteenth Amendment establishes "a realm of personal liberty which the government may not enter," *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992), this Court should rule that a blanket prohibition on assisted suicide cannot withstand scrutiny. With respect to the terminally ill, that is, individuals who in most circumstances will be "too weak, too debilitated, or too dependent on others"[2] to bring about their own unassisted deaths effectively, an absolute ban on assisted suicide results in the state's appropriation of their lives: Their autonomy and liberty have been entirely eliminated.

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[1] When using third-person singular pronouns, this brief will use both genders. This is a stylistic choice that carries no further significance.

[2] Erich H. Loewy, *Healing and Killing, Harming and Not Harming: Physician Participation in Euthanasia and Capital Punishment*, 3 J. of Clinical Ethics 29, 30 (1992).

A. The Nature of the Liberty Interest at Stake

A critical consideration at the outset of any analysis of the liberty interest of the terminally ill in assisted suicide is an understanding of the extent to which self-determination is implicated. The United States has candidly acknowledged that there is a constitutionally protected liberty interest at issue in these cases, but it characterizes this interest as the interest a person has in "avoiding severe pain or suffering." Brief of the United States as Amicus Curiae Supporting Petitioners (in *Washington v. Glucksberg*) at 16 (hereinafter "United States Brief"). This description of the liberty interest is misleading because it is far too circumscribed.[3]

In articulating the precise interest at issue, one must bear in mind the difference between occurrent or limited interferences with one's liberty and comprehensive interferences with one's liberty. Joseph Raz, *The Morality of Freedom* 370-74 (1986). *See also* David Archard, *For*

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[3] At least the United States recognizes that the terminally ill do have a liberty interest that could be pursued through assisted suicide. The State of Washington, on the other hand, along with several *amici* supporting petitioners, suggests there is no liberty interest at stake as "[d]eath is in fact the antithesis of liberty." Brief for Petitioners (in *Washington v. Glucksberg*) at 28. No one would dispute that the dead do not act freely: They do not act at all. However, the focus must be on the right of a person to be free *from* conditions that are oppressive. Unfortunately, some persons find themselves in situations that are literally unbearable and from which the only escape is death. That death may be preferable to a humiliating, degrading, confined existence is a belief that has been rationally held by countless human beings in all ages of human existence. Indeed, many who helped found this country shared this sentiment. The implication of the argument advanced by the State of Washington and several of its *amici* is that Patrick Henry was an incoherent, babbling idiot when he uttered the phrase "give me liberty or give me death." J. Axelrad, *Patrick Henry: The Voice of Freedom* 110-111 (1947). Surely, this Court's constitutional jurisprudence cannot be predicated on such a ludicrous proposition.

Our Own Good, 72 Australasian J. of Phil. 283 (1994). A limited interference with liberty restrains someone from undertaking a particular act or series of acts, such as selling or purchasing corrective lenses without a prescription, *see, e.g., Williamson v. Lee Optical,* 348 U.S. 483 (1955), that has few ramifications for one's central projects in life. A comprehensive interference with liberty affects a wide range of a person's choices. Comprehensive interferences with liberty are, of course, in need of greater justification. Thus, while a state may readily require someone who chooses to pursue a certain specific safety-related occupation to alter his personal appearance slightly, *Kelley v. Johnson,* 425 U.S. 238, 248-49 (1976), it cannot, without a compelling justification, foreclose a whole range of occupations to persons apparently competent to discharge their professional duties in such occupations. *Hampton v. Mow Sun Wong,* 426 U.S. 88, 102-03 (1976). This intuitive distinction, of course, underlies this Court's jurisprudence with respect to fundamental liberty interests. Fundamental liberty interests are those matters involving "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Casey,* 505 U.S. at 851. Such choices include "the decision whether to bear or beget a child," *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972), and the choice of a spouse. *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Such choices affect the very pattern of one's existence; they are the choices through which a person defines himself.

Some interferences with liberty can be so comprehensive that they usurp all of a person's decisions with the result that that person loses control of his life. There can be no more intimate, self-defining decision for a person than the decision whether to continue living. If the degree to which one's autonomy has been violated is a function of the extent to which a person is forced to reorder his life, to redefine himself, then it is no exaggeration to state that

a person forced to remain alive against his will has been totally deprived of his autonomy. When a competent person has reached the conclusion that his life is, on balance, too painful, too degrading, too restricted to be worth living, *for him* there are no activities worth pursuing given the conditions in which he finds himself.[4] To force him to continue living is to condemn him to an existence that has, for him, lost any value. If a person in such circumstances longs to die, but is prevented from doing so, he can no longer make any autonomous choices because his entire existence is compelled. As the legal philosopher Joseph Raz has observed, "[a] person whose every decision is extracted from him by coercion is not an autonomous person." *The Morality of Freedom, supra,* at 373.

The liberty interest at stake in this case is not merely the interest in being free from pain. It is the interest in not being forced to pursue a pain-filled or distressing and restricted life devoid of any subjective meaning and personally abhorrent.[5] A useful analogy can be made to

[4] We emphasize that this is a personal decision for each individual. Some persons may find value in a life in which they are bedridden and racked with pain, perhaps because such suffering has a religious significance for them. *See, e.g.,* John Paul II, *The Gospel of Life* 26-27 (1995). That is why some of petitioners' *amici* are in error when they suggest that recognition that the terminally ill have a liberty interest in assisted suicide "would reflect a judgment by the state that some people are better off dead than alive." Brief *Amici Curiae* of the United States Catholic Conference at 16. It is the individual whose life it is that decides whether his life is worth pursuing. Recognition that a person has a liberty interest in making this choice does not result in the State's endorsement of any particular person's choice any more than the State's allowing persons the freedom to bear or beget a child or to marry results in the State's endorsement of any particular person's choice. Forbearance from interference with another's actions cannot be equated with approval of that person's actions. In "defin[ing] the liberty of all," this Court does not "mandate [its] own moral code." *Casey,* 505 U.S. at 850.

[5] It is important to emphasize that it is not merely pain that motivates many of the terminally ill to elect death, but also "suffer-

"[t]he freedom to marry," described by this Court as "essential to the orderly pursuit of happiness." *Loving*, 388 U.S. at 12. Obviously, the very idea of depriving a competent adult of the opportunity to marry the person of her choice is repugnant. However, being kept alive against one's will involves an even greater violation of autonomy. A compelled life can be appropriately compared only to being forced to marry, and spend all one's waking hours with, a person that one finds utterly loathsome. A person kept alive against her will is similarly yoked to abominable conditions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). In depriving someone of needed assistance in dying, and thereby forcing that person to live, the government assumes complete control of that person's mind, body and spirit.

B. The Need of the Terminally Ill for Assistance in Dying

In his classic article against the legalization of assisted dying, Yale Kamisar argued, among other points, that the extent to which laws against assisted dying infringed on liberty interests had been overstated. Prohibitions on

ing" in the sense of extreme discomfort, distress and loss of functional capacity. Although "medical science does manage to save many dying patients from the extreme of physical pain . . . it often fails to save them from an artificial twilight existence, with nausea, giddiness and extreme restlessness, as well as the long hours of consciousness of a hopeless condition." Glanville Williams *"Mercy-Killing" Legislation—A Rejoinder*, 43 Minn. L. Rev. 1, 8-9 (1958). In fact, for many, both in ancient and contemporary times, loss of functional capacity and accompanying distress may be more unbearable than physical anguish. Margaret Pabst Battin, *The Least Worst Death* 134 (1994) (discussing requests for assisted dying in the Netherlands); 1 Seneca, *Ad Lucilium Epistulae Morales* 409 (Richard M. Gummere trans., William Heinemann) (1917) (not pain, but the limitations resulting from pain, as removing the reasons for living).

assisted suicide or euthanasia, after all, are directed against the person providing assistance, not the person who receives the assistance. There are no longer any criminal penalties for suicide or attempted suicide, so, superficially, any person's interest in escaping a life he finds unacceptable could be accommodated by a simple policy of noninterference in suicides:

> Finally, taking those who may have such a desire [to die], again I must register a strong note of skepticism that many cannot do the job themselves. . . . [A] *laissez-faire* approach in such matters [may be preferable to] an approach aided and sanctioned by the state.[6]

This contention has some merit if one focuses only on the physically robust. Indeed, offering assistance to those truly capable of doing "the job themselves" improperly circumvents an important psychological barrier to hasty, ill-considered suicides—leaving aside any moral problems that may be raised by the offer of such assistance. Generally speaking, if a healthy, able-bodied person is too ambivalent to kill himself without assistance, suicide is, for him, almost surely the wrong decision.

However, unassisted suicide is only an option for those with access to the proper means and the physical strength to use them. As the State maintains control of the dispensation of lethal medications, a person must have access to firearms, knives, ropes or other violent means of death and possess the ability to use these violent means effectively if he is to kill himself without assistance. In the last stages of a terminal illness "the patient is likely to lack the capacity to commit suicide on his own." Richard A. Posner, *Aging and Old Age* 238 (1995). "Physically frail, confined to wheelchairs or beds, many terminally ill patients do not have the means or ability to kill them-

[6] Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 Minn. L. Rev. 969, 1011 (1958).

selves." *Compassion in Dying v. Washington*, 79 F.3d 790, 832 (9th Cir. 1996). *See also* Timothy Quill, *Death and Dignity: Making Choices and Taking Charge* 114 (1994); Loewy, *Healing and Killing, Harming and Not Harming, supra*, at 30. For someone in such a situation, being denied assistance effectively results in that person being kept alive against his will. The principal reason why the terminally ill have such a strong liberty interest in assisted suicide is because they need assistance to die, whereas the overwhelming majority of those who are not terminally ill require no such assistance.[7]

Accordingly, a regulatory scheme that might seem appropriate in the abstract—allowing persons to commit unassisted suicide, but prohibiting assisted suicide—may be unduly burdensome and restrictive when applied to a class of individuals. This Court has not hesitated to strike down legislation that effectively prevents some from pursuing a fundamental liberty interest even though there is no direct restriction on the exercise of that liberty. Thus, a statute requiring a person to fulfill certain financial obligations prior to marrying is unconstitutional if the result is that some persons "are absolutely prevented from getting married." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). "The proper focus of constitutional inquiry is the group for

[7] In emphasizing that the need for assistance is the principal factor supporting the strength of the interest of the terminally ill in assisted suicide, we are not implying there are no other factors. The fact that for the terminally ill the choice is really between a prolonged, agonizing death and a peaceful death distinguishes their situation from those who are not terminally ill. *See In Re Quinlan*, 355 A.2d 647, 664 (N.J.), *cert. denied*, 429 U.S. 922 (1976) ("[T]he State's interest . . . weakens and the individual's right to privacy grows as the . . . prognosis dims."). However, the implications of the fact that for the terminally ill assisted dying is more appropriately characterized as a means of hastening death rather than suicide in the traditional sense is a subject explored in depth by the respondents and other *amici* and there is no need for further analysis here.

whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. As applied to the terminally ill, a blanket prohibition on assisted suicide is unduly burdensome as it deprives them of the freedom of abandoning an existence they find irremediably painful and degrading.

Of course, not everyone who has just received a diagnosis that he is terminally ill will lack the vigor necessary to secure a knife and slash his wrists. However, every responsible proposal for regulating—as opposed to banning—assisted suicide envisions a waiting period of at least a few weeks during which the competency of the person requesting assistance in dying can be assessed and alternatives to suicide explored. *E.g.*, Franklin G. Miller, et al., *Regulating Physician-Assisted Death*, 331 New Eng. J. Med. 119 (1994). During this time, the patient's strength and mobility will likely be diminishing substantially.

Moreover, a justification for continuing the ban on assisted suicide predicated on the possibility that most of the terminally ill will be able to "do the job themselves" if they only act quickly enough is inconsistent with the State's interest in preserving life. Such a ban on assisted suicide will result (and has resulted) in many precipitous or unnecessary suicides. Persons will kill themselves months before they would die if legalized assisted suicide were available. Others will kill themselves who, had they been able to wait to determine whether they wanted assistance in dying, would not have found their lives unbearable. In other words, assuming we desire a regulatory scheme that encourages persons to live as long as they find their lives worthwhile, a policy of permitting assisted suicide for the terminally ill is much more likely to accomplish this end than a continuation of the ban on assisted suicide. As Judge Posner has perceptively stated:

> If the only choice is suicide now and suffering later, individuals will frequently choose suicide now. If the

> choice is suicide now or suicide at no greater cost later, they will choose suicide later because there is always a chance that they are mistaken in believing that continued life will impose unbearable suffering or incapacity on them. . . . The possibility of physician-assisted suicide enables them to wait until they have more information before deciding whether to live or die.

Aging and Old Age, *supra*, at 247-48.[8]

In conclusion, with respect to the terminally ill, a ban on assisted suicide impermissibly intrudes on a fundamental liberty interest. When a state's ban on assisted suicide compels a person to lose all control of her life and to endure conditions she fiinds wholly unacceptable and intolerable, the State has unconstitutionally appropriated that person's life by "insist[ing] . . . upon its own vision of [her] role." *Casey*, 505 U.S. at 852.

II. NO COMPETING STATE INTEREST OUTWEIGHS THE FUNDAMENTAL LIBERTY INTEREST IN NOT BEING COMPELLED TO LIVE

Some who are willing to concede that there is a liberty interest that is infringed by a ban on assisted suicide nonetheless contend that various State interests require a continuation of the ban, in particular the State interest in "protecting the lives of those who do not really wish to die, but who request lethal drugs from their doctors because of real or perceived pressure from others to choose death." United States Brief at 26. Distilled to its essential core, this argument is that the State must "sacrifice the autonomy and dignity of some citizens for the safety and support of others." Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey and the Right to Die*, 44 Am. U. L. Rev. 803, 807 (1995).

[8] Judge Posner, of course, wrote this passage in the context of a scholarly work, not in his capacity as a member of the federal judiciary. We should also note, in fairness to Judge Posner, that as a matter of prudential politics he has indicated he would prefer legalization of assisted suicide on a state-by-state basis, given that, in his view, "the United States is a morally heterogeneous country." *Id.* at 260. Recognition of the insightfulness of Judge Posner's analysis of the beneficial effects of legalized assisted suicide does not require acceptance of his political views.

However, once one acknowledges the strength of the liberty interest at stake, a continuation of the absolute ban on assisted suicide requires a compelling justification unlikely to find its source in speculation and *a priori* reasoning about the alleged dangers arising from assisted suicide. "Since we start with an exercise . . . of an activity included in constitutional protection," only "on a showing of 'the gravest imminent danger to the public safety' " can this activity be prohibited. *Kent v. Dulles*, 357 U.S. 116, 128-29 (1958) (quoting *Korematsu v. United States*, 323 U.S. 214, 218 (1944)). Petitioners cannot meet this heavy burden, especially in light of the confirmed but tolerated dangers that arise from the exercise of comparable liberty interests (to be discussed below). "Our Constitution is designed to maximize individual freedom within a framework of ordered liberty." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Our Constitution does not contemplate the State's appropriation of the freedom of some of its citizens to serve a nebulous utilitarian goal.

A. Regulation, Not an Absolute Ban, Is the Constitutionally Proper Way to Further the State's Interest in Protecting the Terminally Ill from Undue Influence

"The consequentialist arguments for prohibition [of assisted suicide] for the most part do not rest on issues about the welfare of the patient before the court. Rather, they rely on the risks of abuse and mistake in other cases, and the importance of providing support for life-preserving choices elsewhere." *Does Pro-Choice Mean Pro-Kevorkian?*, *supra*, at 842. The contention is that the State has an interest in protecting those terminally ill who do want

to continue living, but who may be pressured or manipulated into requesting assisted death once it is legalized. Although recognition of a right to assisted suicide will respect the autonomy of many who do not want to be compelled to live in painful, degrading circumstances, it may indirectly result in serious harm to a few, vulnerable persons.

As the court below recognized, "[t]he risk of undue influence is real." *Compassion in Dying*, 79 F.3d at 826. While the risks of abuse are often greatly exaggerated, it would be entirely unrealistic to claim that following legalization of assisted suicide there will be no instances of manipulation or coercion. However, two important considerations indicate that this risk is not sufficient to justify an absolute ban on assisted suicide.

To begin, one must bear in mind that the terminally ill are already susceptible to undue influence when they are presented with the choice of withdrawing or withholding life-sustaining treatment. Furthermore, there are few safeguards in place for undue influence in this context. By contrast, no responsible proponent of legalized assisted suicide maintains that the practice should not be subject to stringent regulation to ensure that the request for assistance in dying is the voluntary choice of a competent person. Thus, with respect to protection of the vulnerable, the primary difference after recognition of a constitutional right to assisted suicide will be that whereas now there are only minimal safeguards against undue influence in life-ending situations, post-recognition there will be reasonably effective safeguards (such as the requirements of express, repeated requests, a waiting period, consultation with an expert in palliative care, etc.) in at least some life-ending situations. As the court below discerned, "[g]iven the possibility of undue influence that already exists, the recognition of a right to physician-assisted suicide would not increase that risk unduly," but "[i]n fact, the direct involvement of an impartial and professional

third party in the decision-making process would most likely provide an important safeguard against such abuse." *Compassion in Dying*, 79 F.3d at 826.

The other relevant consideration is that the Court cannot recognize any important liberty interest without the risk that there will be some who will be unavoidably harmed as an indirect result of the freedom the Constitution allows all. Persons are subject to manipulation and pressure from others at all times, but especially with respect to critical life choices such as which career to pursue, whom to marry, whether to divorce, whether to have a child, whether to abort a fetus, etc. It cannot be a sufficient justification for denying individuals the right to make such choices that the decisions of some are the product of pressure or manipulation. Such an overbearing, all-encompassing paternalism would lead to a denial of autonomy in all important areas of our lives.

To reply that decisions for assisted suicide are different because they result in death does not provide a sufficient reason for denying autonomy in this context. To begin, as two noted moral philosophers have observed in their discussion of the risks of assisted suicide, "we often accept social policies that have some [lethal] risks . . . we allow youths sixteen years of age to drive an automobile on public roads with minimal driver's education, although we know there will be some tragic outcomes." Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* 234-35 (4th ed. 1994). Moreover, even if we assume that legalized assisted suicide presents a somewhat greater risk of lethal harm than other freedoms, the proper, measured response would not be to ban assisted suicide entirely, but to insist that there be safeguards in the context of life-ending decisions that do not exist in other areas. Finally, a constitutionally protected fundamental liberty interest cannot be outweighed by the risk that some harm—even lethal harm—will result from the exercise of that protected freedom. An

analysis of one such fundamental liberty interest—the right to bear and beget children—establishes this point.

B. The State Cannot Ban Some Classes of Competent Persons from Bearing and Begetting Children Even Though the Certain Result of Respecting This Liberty Interest Is Thousands of Deaths

Child abuse, up to and including murder of children by their parents, is a very serious problem in this country. In 1993, for example, approximately 1,500 children died as the result of abuse or neglect. U.S. Dep't of Health and Human Serv., *The Third National Incidence Study of Child Abuse and Neglect* 3-12 (1996). Some experts believe the numbers of deaths are significantly underreported and that at least 2,000, and perhaps as many as 5,000, children die annually as the result of abuse and neglect. U.S. Dep't of Health and Human Serv., *A Nation's Shame: Fatal Child Abuse and Neglect in the United States*, 9, 18-19 (1995). Moreover, in addition to fatalities, approximately 18,000 children per year are permanently disabled by abuse or neglect. In fact, "a staggering 9.5 to 28 percent of all disabled persons in the United States may have been made so by child abuse and neglect." *Id.* at 17.

Although persons of all social classes abuse and kill their children, there is a very significant, undeniable correlation between family income and child abuse. Government studies have demonstrated that "higher incidence rates [of abuse] were directly associated with lower income levels, and all differences among the income groups were statistically significant." *Third National Incidence Study* at 5-4. "Children in families with annual incomes lower than $15,000 had the highest rate of abuse" with their rate being "more than two and one-quarter times the rate for children in families with annual incomes of $15,000 to $29,999 . . . and nearly 14 times the rate for children in families with annual incomes of $30,000 or more." *Id.*

One conclusion from this impressive body of empirical evidence is inescapable: if the State were to prohibit persons from having children until they reached and maintained a certain income level, the number of murdered and seriously harmed children would plummet. Thousands of lives would be saved; tens of thousands would be protected against serious injury. Scholars have from time-to-time proposed a licensing requirement for those desiring to have children. *E.g.*, Hugh Lafollette, *Licensing Parents*, 9 Phil. & Pub. Aff. 182 (1980). Nonetheless, such proposals, although obviously well-intentioned and not unworthy of consideration, have almost uniformly been quickly dismissed with incredulity. Nor is there any doubt that were some legislature persuaded that restricting the rights of competent adults to bear and beget children was necessary to prevent "the deaths of other persons whom the State has an unquestionable interest in protecting," *cf.* United States Brief at 22 n.2, this Court would hold such a statute unconstitutional. "If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

The price of freedom can be high, but the Constitution requires society to accept this price to protect our fundamental liberty interests. Moreover, it is clear in the context of procreation that a state cannot constitutionally prohibit a class of persons from enjoying a protected liberty interest even though the exercise of that freedom is certain to result in the deaths of thousands each year. Much less can a state assume total control over a person's life by compelling her to live because of risks that even opponents of assisted suicide admit are "imponderable." *Does Pro-Choice Mean Pro-Kevorkian? supra*, at 846 n. 159.

III. OUR CONSTITUTIONAL HERITAGE REQUIRES RECOGNITION OF A FUNDAMENTAL LIBERTY INTEREST

There is no denying that it would be difficult to find a specific reference to a liberty interest in assisted suicide among those who drafted the Constitution and the Fourteenth Amendment. However, acknowledging this fact does not in any way undermine our argument. "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Casey*, 505 U.S. at 848.

It could hardly be otherwise if the Constitution is not to be a static and lifeless document, but rather a document adaptable to changing social circumstances. Our moral norms and our understanding of the bounds of liberty derive from our shared experience, and, for the most part, our ancestors in the 1780's and in the 1860's simply did not die in the same way we do today: Most individuals today die in hospitals after prolonged illnesses, as opposed to being carried off swiftly by contagious diseases or untreatable conditions. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 339-40 (1990) (Stevens, J., dissenting). Unremarkably, the extent to which there is a perceived liberty interest varies with the need for exercise of that liberty. For most persons a century or two ago, assistance in dying was not necessary for them to avoid being kept alive against their will.

History can, nonetheless, be instructive in this case. In this regard it is ironic that some of petitioners' *amici* invoke practices under the Nazi regime as an argument against recognition of a fundamental liberty interest in this case. Brief *Amicus Curiae* of the Evangelical Lutheran Church in America at 23-24. The practice of involuntary "euthanasia" by the Nazis bears no resemblance to the proposed practice of allowing competent,

terminally ill persons to decide for themselves whether to continue living. The Nazis did not embark on a program of assisted dying only to find their respect for human life and liberty slowly corroding. Beauchamp and Childress, *Principles of Biomedical Ethics* at 232. The killing of the disabled by the Nazis was ancillary to the Nazi goal of promoting their vision of the common good by purifying the German race. Richard Breitman, *The Architect of Genocide: Himmler and the Final Solution* 89 (1991).

What the horrifying example of Nazi Germany does do, however, is remind us that during the last few centuries there have been two prominent, competing views of the relationship between the State and the individual. Under one view—the view embraced by fascism, communism and other authoritarian ideologies—the individual is a pawn of the State and is allowed only such freedom as is determined to be in the best interests of the State. The collective common good always has priority over the rights of the individual. Under the other view—the view which motivated those who founded this country—the State is the servant of the people and has no authority to prohibit critical life choices except to the extent those choices present the "gravest imminent danger to the public safety." *Kent, supra*, 357 U.S. at 128. At bottom, this case is about a choice between these two understandings of the role of the State. Our constitutional heritage mandates that this Court find that the right of an individual to give shape, direction and significance to her life may only be balanced against, and cannot be made slavishly subordinate to, the State's vision of the common good: Our constitutional heritage mandates that this Court find that the State cannot compel a terminally ill person to live when respect for her autonomy presents no imminent danger of harm to others.[9]

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[9] In making this argument we are, of course, in no way suggesting that petitioners or their *amici* are advocates of fascism, communism or other authoritarian ideologies. We are suggesting that

CONCLUSION

For all the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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their arguments, taken to their logical conclusion, have dangerous implications. The State that can disregard personal autonomy and compel individuals to live to promote the State's vision of the common good can also disregard personal autonomy and compel individuals to die to promote the State's vision of the common good.